Nos. 85-621 and 85-642

In the Supreme Court of the United States

OCTOBER TERM, 1985

COMMODITY FUTURES TRADING COMMISSION,
PETITIONER

v.

WILLIAM T. SCHOR, ET AL.

CONTICOMMODITY SERVICES, INC., PETITIONER

v.

WILLIAM T. SCHOR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE COMMODITY FUTURES TRADING COMMISSION

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QUESTION PRESENTED

Whether the Commodity Futures Trading Commission, which adjudicates, subject to judicial review, claims for money damages brought against commodities brokers by customers alleging a violation of the Commodity Exchange Act, is precluded by Article III of the Constitution from entertaining the broker's state law counterclaim arising out of the same transaction or occurrence, when the customer could have brought his claim in an Article III court in the first instance but chose to proceed before the CFTC instead.

PARTIES TO THE PROCEEDING

The Commodity Futures Trading Commission adjudicated the claims of the parties in the administrative proceeding and was a respondent in the court of appeals. ContiCommodity Services, Inc. and Richard L. Sandor were respondents in the administrative proceeding and in the court of appeals. William T. Schor and Mortgage Services of America were complainants in the administrative proceeding and petitioners in the court of appeals.

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OPINIONS BELOW

The opinion of the court of appeals on remand (Pet. App. 1a-7a)[1] is reported at 770 F.2d 211. The initial opinion of the court of appeals (Pet. App. 8a-49a) is reported at 740 F.2d 1262. The order of the

[1] "Pet. App." refers to the appendix to the petition in No. 85-621.

court of appeals denying the suggestion for rehearing en banc following the court of appeals' initial decision (Pet. App. 69a-70a) and the statement of two judges of the court of appeals dissenting from the denial of rehearing en banc (Pet. App. 71a-73a) are unofficially reported at 2 Comm. Fut. L. Rep. (CCH) ¶ 22,409. The decision of the Administrative Law Judge (Pet. App. 53a-63a) is unreported. The order of the Commission denying review of that decision (Pet. App. 50a-52a) is unofficially reported at [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,823.

JURISDICTION

The judgment of the court of appeals (Pet. App. 64a-66a) was entered on August 13, 1985. The petition for a writ of certiorari in No. 85-621 was filed on October 11, 1985. The petition for a writ of certiorari in No. 85-642 was filed on October 16, 1985. The petitions were granted and the cases consolidated on December 9, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Article III of the Constitution; Section 14 of the Commodity Exchange Act, 7 U.S.C. (& Supp. V 1981) 18; the current version of Section 14, 7 U.S.C. 18; Section 6(b) of the Act, 7 U.S.C. (1976 ed.) 9; the current version of Section 6(b), 7 U.S.C. 9; and 17 C.F.R. 12.23(b)(2) (1983), now codified at 17 C.F.R. 12.19, are set forth at Pet. App. 74a-91a. 17 C.F.R. 12.24 and 12.26(a) (1980) are set forth at J.A. 41-42.

STATEMENT

1. The Commodity Exchange Act (CEA), 7 U.S.C. (& Supp. II) 1 *et seq.*, is " 'a comprehensive regulatory structure to oversee the volatile and esoteric futures trading complex.' " *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran* (*Merrill Lynch*), 456 U.S. 353, 356 (1982) (footnote omitted). The CEA broadly prohibits fraudulent and manipulative conduct in connection with commodity futures transactions. 7 U.S.C. 6b, 13(b); see *Merrill Lynch*, 456 U.S. at 365-366. In 1974, Congress amended the CEA to "broaden[] its coverage," to "increase[] the penalties for violation of its provisions," and to create the Commodity Futures Trading Commission (CFTC), which has broad powers to enforce the CEA. *Id.* at 365 (footnote omitted); see, *e.g.*, 7 U.S.C. 13a, 13a-1, 13b.

At the same time that it created the Commission, Congress directed it to establish a "reparations" procedure for the adjudication of disputes between commodity brokers and their customers. Congress intended the reparations procedure to provide an inexpensive and expeditious remedy "analogous to * * * a small claims court." S. Rep. 95-850, 95th Cong., 2d Sess. 11, 16 (1978). Specifically, Section 14 of the CEA, 7 U.S.C. (& Supp. V 1981) 18,[2] provides that any person injured by a violation of the CEA or of CFTC regulations may apply to the Commission for an order directing the offender to pay reparations to the complainant. See 7 U.S.C. (Supp. V 1981) 18(a); 7 U.S.C. (1976 ed.) 18(e). The parties are afforded

[2] Section 14 was amended in 1983 (see Pet. App. 9a n.1), but those amendments are only indirectly material to this litigation. See pages 20-21, *infra*.

a hearing before an administrative law judge, whose decision is subject to review by the Commission. 7 U.S.C. (Supp. V 1981) 18(b) and (c). Final Commission orders are reviewable in the appropriate court of appeals. 7 U.S.C. 18(e).

The first regulations implementing the reparations procedure—regulations issued by the Commission when Section 14 became effective—provided that a party against whom a reparations complaint was brought may file a counterclaim "if it arises out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint." 41 Fed. Reg. 3994, 4002 (1976); 17 C.F.R. 12.23(b)(2) (1976), now codified at 17 C.F.R. 12.19. This is a permissive counterclaim rule; it leaves a party free to proceed on his counterclaim in court, instead of before the CFTC, if he so chooses.

2. a. In February 1980, respondents Schor and Mortgage Services of America invoked the Commission's reparations jurisdiction by filing a complaint against ContiCommodity Services, Inc. and Richard L. Sandor, a Conti employee.[3] Conti was a commodity futures broker; Schor had an account with Conti and used the account to buy and sell commodity futures. Conti and Schor agreed that Schor's account

[3] Two complaints, relating to separate trading accounts, were filed on behalf of Schor and the mortgage banking company, Mortgage Services of America, of which Schor was president and 90% shareholder. The complaints contained virtually identical allegations and were consolidated at the administrative level. The court of appeals also consolidated the two separate petitions for review of the Commission's final reparation order filed by Schor and Mortgage Services of America. We refer to Schor and Mortgage Services of America jointly as "Schor," and to Conti and Sandor jointly as "Conti."

contained a "debit balance" (Pet. App. 63a)—that is, net trading losses and expenses (such as commissions) exceeded the deposits made in the account by Schor. But Schor asserted that the debit balance was the result of Conti's violations of the CEA. In particular, Schor alleged that Conti had failed to execute market orders that Schor had attempted to place, thus committing fraud prohibited by the CEA. Conti denied the allegations and filed a counterclaim seeking to recover the debit balance from Schor. Conti's counterclaim asserted that the debit balance resulted from Schor's trading and was therefore a simple debt owed by Schor. Pet. App. 11a-13a, 53a; J.A. 29-30, 31-32.

Before receiving notice that Schor had commenced the reparations proceeding, Conti had filed a diversity action in federal district court to recover the debit balance. *Conti-Commodity Services, Inc.* v. *Mortgage Services of America, Inc.*, No. 80 C 1089 (N.D. Ill.). Schor filed a counterclaim in that action, alleging that Conti had violated the CEA. Schor also moved on two separate occasions to dismiss or stay the district court action because "[t]he reparations proceedings * * * will fully and completely resolve and adjudicate all of the rights of the parties to this action with respect to the transactions which are the subject matter of this action." J.A. 13; see also J.A. 19. In support of his motions, Schor further stated that "[t]he continuation of th[e] [court] action * * * would be unjust to [Schor] in that it would require [him], at a great cost and expense, to litigate the same issues in two forums." J.A. 13; see also J.A. 19. Although the district court declined to stay or dismiss the suit (J.A. 15, 16), Conti voluntarily dismissed the federal court action and pre-

sented its debit balance claim as a counterclaim in the Commission's reparations proceeding. See J.A. 29-30, 31-32.

b. The administrative law judge, after conducting an evidentiary hearing, preliminarily ruled in Conti's favor on both the claim and the counterclaim. After this ruling, Schor for the first time challenged the Commission's statutory authority to adjudicate Conti's counterclaim. The ALJ then issued his decision, holding that Schor had failed to establish that Conti had violated the Act and awarding Conti the debit balance in the account. Pet. App. 53a-63a. The Commission denied Schor's application for review of the ALJ's decision. *Id.* at 50a-52a.

3. On June 28, 1983, Schor filed a petition for review of the Commission's order in the court of appeals. A few days before oral argument, the court of appeals, sua sponte, raised the question whether *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982)—in which this Court declared unconstitutional, under Article III, the adjudication of certain claims by the bankruptcy courts established by the Bankruptcy Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 *et seq.* (see 28 U.S.C. (Supp. II 1978) 1471)—was relevant to the Commission's adjudication of Conti's counterclaims.

After briefing and argument on this issue, the court of appeals upheld most aspects of the Commission's ruling on Schor's claim (Pet. App. 14a-18a)[4] but ordered the dismissal of Conti's counterclaims on the ground that "the CFTC lacks authority (subject matter competence) to adjudicate" common law counter-

[4] In one respect, the court of appeals vacated the Commission's rejection of Schor's claim and remanded for further proceedings. Pet. App. 18a. That aspect of the court of appeals' decision is not at issue here.

claims. *Id.* at 10a. The court of appeals acknowledged the similarities between the CFTC's adjudicatory scheme and the form of administrative agency adjudication upheld in *Crowell* v. *Benson*, 285 U.S. 22 (1932). Pet. App. 33a n.24. The court of appeals stated, however, that this Court's "latest Article III pronouncement—*Northern Pipeline*, *supra*—* * * generates doubt concerning the constitutionality of [the] Commission['s adjudication of counterclaims] sufficient to impel us to interpret the CEA as withholding from the Commission jurisdiction * * * over common law counterclaims." Pet. App. 23a.

a. The court of appeals first analyzed the CFTC's counterclaim jurisdiction according to the framework established in the plurality opinion in *Northern Pipeline*. The court ruled that CFTC adjudication of counterclaims "does not fit within" either "the Article III exception carved long ago for 'legislative courts' " or "the Article III court 'adjunct' accommodation." Pet. App. 24a (footnote omitted). Specifically, the court reasoned that the Commission's power to adjudicate counterclaims like Conti's cannot rest on the ground that the Commission functions as a " 'legislative court' " that may, consistently with Article III, adjudicate " 'public rights' cases" (*ibid.*) because the government is not a party to the counterclaim, which "involve[s] 'adjudication of state-created private rights' " (*id.* at 26a (citation omitted)). And the court of appeals concluded that the Commission does not function as an "adjunct" of an Article III court because Article III courts are not free to reconsider the CFTC's factual findings de novo and Article III judges do not control the appointment or removal of Commissioners or the reference of claims to the Commission. *Id.* at 28a-32a.

The court of appeals then turned to, and rejected, the Commission's contention that Schor had effectively consented to CFTC adjudication of Conti's counterclaim against him. The Commission had pointed out that Schor had an implied right of action under the CEA (see *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran, supra*)[5] and therefore could have brought his claim against Conti in federal district court; the Commission contended that when Schor chose to bring his claim in the CFTC reparations proceeding instead, with full knowledge that the Commission would allow Conti to bring a counterclaim arising out of the same transaction, Schor consented to CFTC adjudication of such a counterclaim.[6] The court of appeals questioned whether consent could establish the constitutionality of CFTC adjudication of Conti's counterclaim (see Pet. App. 39a-40a), but it rejected the Commission's argument principally on the ground that "Schor has [not] manifested * * * unburdened assent to CFTC jurisdiction over Conti's counterclaims." *Id.* at 37a. The court of appeals reasoned as follows:

> [C]omplainants positioned as Schor [are faced] with this choice: File a reparations complaint with the Commission and "consent" to relinquish the right to have an Article III tribunal adjudicate the broker's related common law claims; or forgo the congressionally-established right to a Commission determination of a reparations com-

[5] In 1983, Congress amended the CEA to provide expressly for private rights of action. See 7 U.S.C. 25.

[6] Indeed, Schor consistently sought dismissal of the suit by Conti for the debit balance in federal district court because the reparations proceedings would fully resolve all of the issues presented. See page 5, *supra*.

> plaint * * *. This is hardly * * * cost-free consent * * *.

Id. at 38a-39a (footnote omitted).

b. Having concluded that "[s]erious constitutional problems thus attend CFTC adjudication of common law counterclaims[,]" the court of appeals stated that the CEA did not manifest a "firm [congressional] intention regarding CFTC jurisdiction over common law counterclaims" and ruled that it would "adopt the construction of the Act that avoids significant constitutional questions." Pet. App. 40a-41a. In determining that the CEA did not clearly authorize the CFTC to adjudicate counterclaims like Conti's, the court refused to defer to the CFTC's interpretation of the Act on the ground that the question whether the CEA authorizes adjudication of counterclaims by the CFTC is a "statutory interpretation-jurisdictional question * * * [of] precisely the kind with which courts customarily deal," not a "'matter[] within the agency's expertise.'" *Id.* at 45a (citation omitted).[7]

The court below recognized that at the time Schor brought his reparations claim, the text of the CEA explicitly referred to counterclaims (7 U.S.C. (1976 ed.) 18(d)) and contemplated that the CFTC might award reparations against the complainant (7 U.S.C. (1976 ed.) 18(f) and (g)), but the court stated that

[7] The court also noted that the Commission had once issued a *proposed* regulation that permitted only a narrower class of counterclaims to be brought in the reparations forum; even though that regulation was never adopted, the court of appeals concluded on this basis that "[t]he CFTC has not maintained a consistent position on the scope of its authority to adjudicate counterclaims." Pet. App. 43a-44a.

"Congress might have contemplated counterclaims only * * * of a narrow compass." Pet. App. 42a.[8] Finally, the court of appeals acknowledged (*id.* at 47a) that the House report accompanying the 1974 amendments to the CEA—the amendments that established the reparations procedure—explicitly stated that "[c]ounterclaims will be recognized in [reparations] proceedings * * * on such terms and under such circumstances as the Commission may prescribe by regulation" (H.R. Rep. 93-975, 93d Cong., 2d Sess. 23 (1974)); but the court dismissed this statement as a "fragment[] of legislative history" that could not manifest congressional intent because "it would be extraordinary for a legislature to deliver such a blank check to an administrative tribunal" (Pet. App. 46a-47a).

4. The court of appeals denied rehearing en banc by a divided vote. Pet. App. 69a-73a. In a dissenting statement, Judge Wald, joined by Judge Starr, urged that rehearing be granted because the panel's holding would "result[] in a serious evisceration of a congressionally crafted scheme for compensating victims of Commodity Futures Trading Act * * * violations" and would "decimate[]" this "faster and less expensive alternative forum." *Id.* at 71a. Judge Wald determined that "there is no doubt" that "Congress *expressly* meant to convey * * * jurisdiction" over counterclaims like Conti's to the Commission, and that "[t]o suggest otherwise is to blink reality." *Ibid.* (emphasis in original). Judge Wald also indicated that she considered the Commission's consent argument to be substantial, noting that "[p]etitioners to

[8] Specifically, the court of appeals suggested that the CFTC has authority to resolve only counterclaims based on the CEA itself. See, *e.g.*, Pet. App. 42a-43a.

the CFTC forum, like Schor[], plainly take notice of the counterclaim risk. Moreover, CFTC petitioners presently enjoy a private right of action under the [CEA] in federal courts." *Id.* at 72a. Judge Wald concluded as follows:

> In sum, this is, so far as I know, the first major extension of [*Northern Pipeline*] to a congressionally created compensation scheme enacted as an alternative to court adjudication in a specialized financial area in which federal jurisdiction is primary, in which the common law counterclaims are incidental and arise out of this main jurisdiction, and in which access to the adjudicative forum is by consent and choice of the complainant. The panel's reasoning has fatal implications for other alternative administrative forums to the courts in specialized areas.

Id. at 72a-73a.

5. Following the denial of rehearing, the Solicitor General, on behalf of the Commission, filed a petition for a writ of certiorari (No. 84-1519). On July 2, 1985, the Court granted the petition, vacated the court of appeals' judgment, and remanded the case for further consideration in light of *Thomas* v. *Union Carbide Agricultural Products Co.*, No. 84-497 (July 1, 1985), in which the Court held that the arbitration scheme established under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. (& Supp. II) 136 *et seq.*, does not contravene Article III.[9]

[9] The Court denied Schor's cross-petition for a writ of certiorari (No. 84-1673) on June 17, 1985. Following the decision of the court of appeals on remand, Schor filed a second cross-petition (No. 85-872), substantially identical to the first, which the Court denied on January 21, 1986.

6. On remand, the court of appeals reinstated its prior judgment. Pet. App. 1a-7a. The court distinguished *Thomas* on two grounds. First, the court concluded that *Thomas* had no application because that case "arose entirely within the confines of federal law," while here the counterclaim arose under state law. Pet. App. 4a. Second, the court found that Congress spoke more explicitly in FIFRA than it did in establishing the CFTC's jurisdiction in the CEA. *Ibid.* The court reaffirmed its earlier view that *Northern Pipeline* controls this case and mandates invalidation of the Commission's authority to decide debit balance counterclaims in reparations proceedings. Pet. App. 5a n.9, 6a-7a & n.15.

INTRODUCTION AND SUMMARY OF ARGUMENT

Article III of the Constitution provides that "[t]he judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," and that the judges of these courts shall serve "during good Behaviour," with compensation that "shall not be diminished" during their tenure. These provisions are intended to "protect the role of the independent judiciary within the constitutional scheme of tripartite government and assure impartial adjudication in federal courts." *Thomas* v. *Union Carbide Agricultural Products Co.*, No. 84-497 (July 1, 1985), slip op. 13; see, *e.g.*, *O'Donoghue* v. *United States*, 289 U.S. 516, 530-534 (1933).

In light, however, of the broad powers the Constitution elsewhere confers upon Congress, "[a]n absolute construction of Article III is not possible." *Thomas*, slip op. 13. Rather, as this Court has recognized for more than 150 years, Congress has substantial flexi-

bility to assign adjudicative tasks to "legislative courts" and other administrative tribunals created pursuant to its powers under Article I. See, *e.g.*, *Thomas*, slip op. 13; *Palmore* v. *United States*, 411 U.S. 389, 408 (1973); *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 594-596 (1949) (plurality opinion); *id.* at 641-644 (Vinson, C.J., dissenting); *Crowell* v. *Benson*, 285 U.S. 22 (1932); *American Insurance Co.* v. *Canter*, 26 U.S. (1 Pet.) 511 (1828); P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 396 (2d ed. 1973); cf. *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. 442 (1977). The capacity of the parties to a dispute to consent to a federally enforceable adjudication before a decisionmaker lacking the salary and tenure protections of Article III is equally well-established. See, *e.g.*, *Ex parte Peterson*, 253 U.S. 300, 314 (1920); *David Lupton's Sons Co.* v. *Automobile Club of America*, 225 U.S. 489, 494-495 (1912); *Kimberly* v. *Arms*, 129 U.S. 512, 524 (1889); *Heckers* v. *Fowler*, 69 U.S. (2 Wall.) 123, 131 (1864); *Field* v. *Holland*, 10 U.S. (6 Cranch) 8, 20-21 (1810); see also 9 U.S.C. 1 *et seq.* (Federal Arbitration Act).

The question presented in this case is whether Article III prohibits the Commodity Futures Trading Commission from adjudicating, on the basis of the parties' consent and subject to judicial review, a counterclaim arising out of the same transaction that forms the basis for a complaint for reparations under the Commodity Exchange Act. We submit that such adjudication is fully consistent with this Court's precedents and does not impinge on any value underlying Article III. The consent of the parties surely satisfies the constitutional concern for fair and im-

partial adjudication. And the availability of an initial administrative forum in these circumstances plainly does not threaten the independence of the federal judiciary: the option to proceed before the CFTC in a dispute such as this one neither interferes with the judiciary's consideration of cases before it nor prevents the judiciary from performing its constitutionally assigned function as the ultimate arbiter of federal law.

The court of appeals relied almost exclusively on the plurality opinion in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the only case in which this Court has ever invalidated on Article III grounds Congress's establishment of a non-Article III federal adjudicative tribunal. In the court of appeals' view, *Northern Pipeline* prohibits the adjudication by an Article I decisionmaker of causes of action, such as the counterclaim at issue in this case, that arise under state law. This conclusion, however, ignores the nonconsensual nature of the adjudication in *Northern Pipeline*, a factor whose central importance was recognized in each of the opinions in that case and subsequently by the Court in *Thomas*. See *Northern Pipeline*, 458 U.S. at 80 n.31 (plurality opinion); *id.* at 91 (Rehnquist, J., concurring in the judgment); *id.* at 92 (Burger, C.J., dissenting); *id.* at 95 (White, J., dissenting); *Thomas*, slip op. 14. It also disregards the extremely close factual and legal relationship between Schor's reparations claim and Conti's counterclaim and the limited and specialized nature of the CFTC's reparations jurisdiction.

In *Thomas*, this Court recently admonished that "practical attention to substance rather than doctrinaire reliance on formal categories should inform

application of Article III." Slip op. 17. Under that approach, the constitutionality of the administrative adjudication of what in federal court would be a compulsory counterclaim is, we think, unassailable. Any other result would prevent the administrative tribunal from " 'decid[ing] all matters in dispute and decree[ing] complete relief,' " and would effectively "dismember a scheme which Congress has prescribed." *Katchen* v. *Landy*, 382 U.S. 323, 335, 339 (1966). There is no warrant in Article III for mandating that parties may not consent to the CFTC's adjudication, subject to judicial review, of a counterclaim such as Conti's as an incident to the Commission's decision, the constitutionality of which is undoubted, on a reparations claim brought under the CEA.

* * * * *

A. Before confronting the Article III issues presented in this case, it is necessary to address the court of appeals' conclusion that Congress did not authorize the Commission to entertain counterclaims that, like Conti's, arise out of the same transaction as an underlying reparations complaint. That conclusion is plainly wrong. The Commission's rule permitting such counterclaims is authorized by the agency's sweeping rulemaking authority, which empowers it to promulgate rules that are, in the CFTC's judgment, reasonably necessary to accomplish any purpose of the Commodity Exchange Act. Moreover, the legislative history of the Act clearly shows that the rule established by the Commission fully comports with Congress's intent.

B. The practical result of invalidating the Commission's counterclaim rule would be that the "faster and less expensive alternative forum" established by Congress "will be decimated." Pet. App. 71a (Wald,

J., dissenting from denial of rehearing en banc). Because of the incentives facing parties to avoid piecemeal litigation, they would be deterred from proceeding in a forum that, because of the absence of jurisdiction over counterclaims, could not resolve their entire dispute. It is the Commission's judgment that reparations complainants, if faced with the prospect of defending against a counterclaim in federal court in any event, would choose to forgo altogether bringing their actions before the administrative tribunal and would simply proceed at once to court. This would not only deprive the parties of the advantages of a more convenient and expeditious forum, it would also deprive the Commission of a significant tool for interpreting the law and policing the industry.

C. In our view, Schor's voluntary and knowing consent to the Commission's adjudication of Conti's counterclaim conclusively answers any Article III objection to the procedure. Schor plainly gave effective consent by electing to bring his complaint before the Commission rather than in court, with full knowledge that Conti would be able to raise its counterclaim in the same forum. Indeed, Schor repeatedly sought dismissal of Conti's federal court action to recover the debit balance on the ground that he preferred to have the entire controversy resolved by the CFTC.

A fundamental purpose of Article III is to ensure the litigants' right to an impartial decisionmaker. Like any other right intended to protect the parties, it is subject to waiver by them. This Court, accordingly, has long held that parties may waive their right to an Article III decisionmaker by consenting to a hearing before a referee or arbitrator whose decision is enforceable in federal court. Similarly, the

courts of appeals have uniformly upheld the constitutionality of the Magistrates Act, which permits the parties to consent to trial before a magistrate who does not enjoy the salary and tenure protections of Article III. No institutional concern underlying Article III is jeopardized by the CFTC's adjudication of state law counterclaims: such adjudication does not threaten the independence of Article III judges, nor does it undermine the judiciary's role as the ultimate expositor of federal law. In sum, there is no reason to find that Schor's consent is constitutionally ineffective.

D. The Commission's reparations forum possesses characteristics definitively establishing its constitutionality wholly apart from the parties' consent. Counterclaims such as Conti's arise out of the same transaction that forms the basis for the reparations complaint; in federal court, these would be compulsory counterclaims under Fed. R. Civ. P. 13(a) within the court's ancillary jurisdiction even in the absence of an independent jurisdictional basis. Such a rule is necessary in order to provide complete relief between the parties and to avoid deterring them from utilizing the forum altogether because such relief is not possible. The same concerns support the Commission's counterclaim rule. Once a case is properly in the administrative forum, no Article III value could possibly be impinged by allowing the tribunal to entertain factually intertwined counterclaims such as the one at issue here.

In addition, the Commission's adjudication of counterclaims is functionally identical to the administrative adjudicatory scheme upheld by the Court in *Crowell* v. *Benson*, 285 U.S. 22 (1932), and it is supported as well by the pragmatic concerns that, as

this Court recently emphasized, must be the focus of inquiry under Article III. *Thomas* v. *Union Carbide Agricultural Products Co.*, No. 84-497 (July 1, 1985). The reparations procedure resolves only claims arising in a narrow and highly specialized financial area. Moreover, the Commission's decision on a debit balance counterclaim such as Conti's necessarily depends on its resolution of the federal law issue presented by the reparations complainant. Finally, the Commission's counterclaim rule is fully consistent with the plurality opinion, as well as the other opinions, in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

ARGUMENT

WHEN A CUSTOMER CHOOSES TO BRING A REPARATIONS COMPLAINT AGAINST A BROKER BEFORE THE COMMODITY FUTURES TRADING COMMISSION, THE COMMISSION'S ADJUDICATION, SUBJECT TO JUDICIAL REVIEW, OF THE BROKER'S COUNTERCLAIM ARISING OUT OF THE SAME TRANSACTION GIVING RISE TO THE COMPLAINT IS CONSISTENT WITH ARTICLE III

A. The Commodity Exchange Act Authorizes the Commission To Entertain A Counterclaim That Arises Out Of The Same Transaction That Forms The Basis For The Underlying Reparations Complaint

1. The court of appeals' holding that Congress did not authorize the Commission to entertain counterclaims like Conti's is, in our view, transparently erroneous. Congress conferred "broad rule-making powers" on the CFTC. *Rice* v. *Board of Trade*, 331 U.S. 247, 252 (1947). Indeed, Congress's grant of authority to the Commission is phrased in particularly sweeping terms; the Commission is authorized

"to make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions *or to accomplish any of the purposes of* [the CEA]." 7 U.S.C. (1976 ed.) 12a(5) (emphasis added). See also H.R. Rep. 93-975, 93d Cong., 2d Sess. 22 (1974) (noting that the CFTC is "expect[ed] * * * to publish regulations" implementing the reparations procedure). Since, as we explain below (pages 24-27), excluding counterclaims that arise from the same transaction would undermine the entire reparations procedure, there can be no doubt that the Commission acted within its authority when it issued a regulation permitting such counterclaims to be brought in reparations proceedings.

The Commission's counterclaim rule is, in any event, supported by more than the breadth of its rule-making power and the reasonableness of its rule. The legislative history of the CEA makes clear that when Congress established the reparations procedure, it intended to grant the CFTC not just broad regulatory powers in general but, specifically, broad authority to issue a regulation authorizing counterclaims. The House report on the legislation that established the reparations procedure explicitly stated that the Commission is to exercise such authority:

> Counterclaims will be recognized in [reparations] proceedings but on such terms and under such circumstances as the Commission may prescribe by regulation. It is the intent of the Committee that the Commission will promulgate appropriate regulations to implement this section.

H.R. Rep. 93-975, *supra*, at 23. Moreover, the text of Section 14, which established the reparations forum, refers on numerous occasions to "the complainant" or

the "person complaining" (*e.g.*, 7 U.S.C. (Supp. V 1981) 18(a); 7 U.S.C. (1976 ed.) 18(d) and (e)) and to "the respondent" (*e.g.*, 7 U.S.C. (Supp. V 1981) 18(a), (b) and (c); 7 U.S.C. (1976 ed.) 18(d) and (e)). It carefully specifies, however, that enforcement of an order awarding reparations may be sought by "the complainant, *or any person for whose benefit such order was made*" (7 U.S.C. (1976 ed.) 18(f) (emphasis added)) and that review of a reparations order may be sought by "*any party* aggrieved thereby" (7 U.S.C. (1976 ed.) 18(g) (emphasis added)). The most likely explanation of the review provision, and the only possible explanation of the enforcement provision, is that Congress envisioned that counterclaims would be permitted in reparations proceedings. Further, Section 14 requires nonresident complainants to post a bond to secure not just "the payment of costs, including a reasonable attorney's fee for the respondent if the respondent shall prevail," but also the payment of "any reparation award that may be issued by the Commission against the complainant *on any counterclaim* by respondent." 7 U.S.C. (1976 ed.) 18(d) (emphasis added).

Moreover, when Congress amended Section 14 in 1978, see Futures Trading Act of 1978, Pub. L. No. 95-405, § 21, 92 Stat. 875, it expressed no disagreement with the CFTC regulation—which, as we noted, was issued at the same time that the reparations procedure took effect—that asserted jurisdiction over all counterclaims arising out of the same transactions as the reparations claim. In 1983, Congress again amended Section 14 specifically to "provide that the trading privileges of a *customer against whom an award was rendered on a* [*broker's*] *counterclaim* could be terminated if payment of the award was not

timely made." H.R. Rep. 97-565, 97th Cong., 2d Sess. Pt. 1, at 106 (1982) (emphasis added). The legislative deliberations preceding the 1983 amendments to the Act reveal that it was universally understood that "the reparations program seeks to pass upon the whole controversy surrounding each claim, *including counter-claims arising out of the same set of facts.*" *Id.* at 55 (emphasis added).[10] These amendments explicitly authorized the CFTC to promulgate rules that "may prescribe, * * * without limitation * * * [,] the nature and scope of * * * counterclaims." 7 U.S.C. 18(b).

2. The court of appeals responded to this abundant evidence of congressional intent to permit the CFTC to regulate its own counterclaim jurisdiction by suggesting that Congress might have intended to allow the Commission to permit only a narrower class of counterclaims, such as counterclaims arising under the CEA itself. See, *e.g.*, Pet. App. 42a, 43a.[11] This

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[10] Accord, S. Rep. 97-384, 97th Cong., 2d Sess. 49 (1982); 128 Cong. Rec. S13077 (daily ed. Oct. 1, 1982) (statement of Sen. Helms); *Commodity Futures Trading Commission Reauthorization: Hearings on S. 2109 Before the Subcomm. on Agricultural Research and General Legislation of the Senate Comm. on Agriculture, Nutrition, and Forestry*, 97th Cong., 2d Sess. 302 (1982) (statement of Philip McB. Johnson, Chairman, CFTC); *CFTC Reauthorization: Hearings on H.R. 5447 Before the Subcomm. on Conservation, Credit, and Rural Development of the House Comm. on Agriculture*, 97th Cong., 2d Sess. 117 (1982) (statement of Philip McB. Johnson).

[11] The court of appeals also stated that the CFTC's interpretation of the statute it is charged with administering is not entitled to deference because the Commission "has not maintained a consistent position on the scope of its authority to adjudicate counterclaims." Pet. App. 43a-44a. As we have noted, however (page 4, *supra*), the CFTC issued the counterclaim rule currently in force at the time that the repara-

is no more than unsubstantiated speculation on the part of the court of appeals; the court cited no evidence whatever that Congress intended to limit the

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tions program first took effect; the rule has been the same throughout. The only "inconsistency" identified by the court of appeals was a *proposed* rule, published by the Commission for notice and comment, that would have allowed a much narrower class of counterclaims. 40 Fed. Reg. 55666, 55667, 55672-55673 (1975). But a proposed regulation, of course, does not represent an agency's considered interpretation of its statute; an agency is entitled to consider alternative interpretations before settling on the view it considers most sound without relinquishing the deference that Congress intended it to be accorded. It would obviously be antithetical to the purposes of the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. 553, to tax an agency with "inconsistency" whenever it circulates a proposal that it has not firmly decided to put into effect and that it subsequently modifies in response to public comment. In fact, the Commission noted that it would "particularly appreciate comments" on the scope of counterclaims that should be permitted in reparations proceedings. 40 Fed. Reg. at 55667. And while the Commission noted in its proposed rulemaking that there was a "substantial question" (*ibid.*) whether a broader counterclaim rule was authorized under the CEA, it certainly did not take the position that the Act definitely barred it from adopting the counterclaim rule that it ultimately promulgated. For all these reasons, there is no justification for the court of appeals' assertion that the CFTC has taken inconsistent positions on this question.

The court of appeals also asserted that whether the CFTC can entertain counterclaims like Conti's is a "statutory interpretation-jurisdictional question" on which the courts, not the agency, are expert. Pet. App. 45a. It is unclear what the court of appeals meant by this statement. Courts are, of course, required to defer to agencies on questions of "statutory interpretation" when the statute is one that the agency is charged with administering. See, *e.g.*, *Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council, Inc.*, No. 83-1013 (Feb. 27, 1985), slip op. 8-9. And issues concerning the nature of the counterclaim rule that would best serve the purposes of the reparations scheme are obviously questions on which the CFTC, not the courts, has superior expertise. See also *NLRB* v. *City Disposal Systems, Inc.*, 465 U.S. 822, 830 n.7 (1984) (quotation marks omitted) (there is no "exception * * * to the normal standard of review of [NLRB] interpretations of the [National Labor Relations] Act" for "jurisdictional or legal question[s] concerning the coverage of the Act").

CFTC's authority in this way. The Commission was given broad powers to effectuate the provisions and purposes of the CEA; there are unmistakable indications that Congress expected the CFTC to issue a regulation permitting counterclaims in reparations cases; nothing in the text or the legislative history of the CEA suggests that Congress intended to limit the CFTC's power to issue a regulation authorizing counterclaims; and the court of appeals did not question that the counterclaim regulation issued by the CFTC is reasonably necessary to accomplish the purposes of the reparations scheme established by Congress.

Moreover, the court of appeals' speculation that the CFTC's counterclaim jurisdiction might extend only to counterclaims alleging violations of the CEA ignores the fact that such claims virtually never arise. As the Commission advised the court of appeals in its rehearing petition, only one such counterclaim was ever brought in a reparations action—and it did not state a cognizable claim under the CEA. For the most part, the prohibitions of the CEA that might give rise to claims for damages simply do not apply to customers. For all these reasons, there is simply no basis for the court of appeals' decision to attribute to Congress a desire to preclude the regulation that

the Commission issued.[12] "The canon favoring constructions of statutes to avoid constitutional questions does not * * * license a court to usurp the policy-making and legislative functions of duly elected representatives" or of the expert agencies the legislature has created to help carry out its will. *Heckler* v. *Mathews*, 465 U.S. 728, 741 (1984).

B. The Commission's Adjudication Of Counterclaims In These Circumstances Is Necessary To Achieve The Purposes Of The Reparations Program

1. The reparations program was created by Congress in order to provide an inexpensive and expeditious alternative to court litigation. S. Rep. 95-850, 95th Cong., 2d Sess. 11, 16 (1978). Since its inception in 1975, the program has disposed of more than 8,000 claims that might otherwise have been adjudicated in the federal courts.[13] Barring the Commission from adjudicating counterclaims such as Conti's would require the parties either to litigate the same disputed issues in two different forums or else to forgo recourse to the administrative tribunal altogether. Judge Wald therefore correctly concluded that the result reached by the court of appeals would "serious[ly] eviscerat[e]" the entire reparations program. Pet. App. 71a.

The controversy between Schor and Conti is typical of the disputes that give rise to a reparations claim.

[12] The court of appeals offered no new support for its statutory analysis in its opinion on remand.

[13] See 1984 CFTC Ann. Rep. 113; 1983 CFTC Ann. Rep. 27; 1982 CFTC Ann. Rep. 33; 1981 CFTC Ann. Rep. 40; 1980 CFTC Ann. Rep. 27; 1979 CFTC Ann. Rep. 30; 1978 CFTC Ann. Rep. 109; 1977 CFTC Ann. Rep. 71; 1976 CFTC Ann. Rep. 87.

Routinely, in CFTC reparations proceedings, a customer and a commodity broker agree that the customer's account contains a debit balance. The customer brings a reparations claim, asserting that the broker created the debit balance by violating the CEA; frequently, the broker counterclaims, asserting that the customer simply owes it the debit balance. In such cases, as the Commission explained in a decision in which it affirmed its authority to resolve counterclaims, the counterclaim "arises out of precisely the same course of events" as the principal claim and requires resolution of many of the same disputed factual issues. *Friedman* v. *Dean Witter & Co.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,307, at 25,538 (Nov. 13, 1981).

Under the Commission's regulation, such a dispute may be resolved, in its entirety, in the administrative forum.[14] Under the court of appeals' approach, the counterclaim may be adjudicated only in a federal or state court. Although invalidation of the Commission's counterclaim rule would theoretically still permit the customer's claim to be adjudicated by the CFTC, a number of considerations support the Commission's conclusion that the practical result of such an approach would be to force the entire dispute into court. See Pet. App. 71a (Wald, J., dissenting from denial of rehearing en banc) (emphasis in original) ("To bifurcate, as the panel's decision now requires, the main reparations proceeding from counterclaims between the same parties makes no sense * * * and

[14] We note that the new Bankruptcy Act also permits the resolution of counterclaims by the bankruptcy judge in connection with his decision on claims against the estate. See 28 U.S.C. 157(b)(2)(C).

will realistically mean that the *courts*, not the agency, will end up dealing with *all* of these claims."); cf. *Katchen* v. *Landy*, 382 U.S. 323, 339 (1966).

In the first place, once a broker is required to proceed against his customer in court rather than before the Commission, the customer often will be forced by a compulsory counterclaim rule such as Fed. R. Civ. P. 13(a) to file his claim against the broker in the same court.[15] Morever, even if a compulsory counterclaim rule does not apply, the customer—who is often an individual proceeding pro se[16]—is unlikely to be willing to bear the expense and inconvenience of litigating the same factual issue in two different forums. As Schor himself noted in arguing for dismissal of Conti's action in federal court, "continuation of th[e] [court] action. * * * would be unjust to [Schor] in that it would require [him], at a great cost and expense, to litigate the same issues in two forums." J.A. 13. Finally, it is the Commission's judgment that if its counterclaim rule is invalidated, potential reparations claimants—knowing that a counterclaim will force them into court in any event—will often forgo bringing their reparations claims before the Commission in the first place and

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[15] The Commission ordinarily will not proceed on a reparations complaint against a broker if the broker's claim against the customer for the debit balance is pending in a court that has a compulsory counterclaim rule. See *Misasi* v. *Paine, Webber, Jackson & Curtis, Inc.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,351, at 25,663 (Dec. 30, 1981).

[16] The Commission's experience is that more than 50% of reparations complainants proceed pro se. See generally *Rosenthal & Co.* v. *CFTC*, 614 F.2d 1121, 1123 (7th Cir. 1980).

will proceed instead directly to court. Cf. *Crowell* v. *Benson*, 285 U.S. 22, 94 (1932) (Brandeis, J., dissenting).

In short, the parties (and the tribunals as well) have a significant interest in resolving the entire dispute in one forum. Precluding the CFTC from adjudicating counterclaims will therefore in many instances be tantamount to barring the Commission from playing any role whatever in resolving the dispute. Such a result not only would seriously undermine the congressionally created administrative dispute resolution forum, it would also deprive the Commission of an important opportunity for developing a consistent course of administrative interpretation of the governing law and of a significant tool for policing the commodities industry: for example, reparations complaints are reviewed for possible investigation and law enforcement action by the Commission's Division of Enforcement. See 7 U.S.C. 15; see also *Myron* v. *Hauser*, 673 F.2d 994, 1005 (8th Cir. 1982) ("[I]n a functional sense * * * [the reparations proceeding is] between the government and the commodity * * * broker, the party subject to government regulation."); *Bowley* v. *Stotler & Co.*, 751 F.2d 641, 644-646 (3d Cir. 1985) (relying on interpretation of the law developed by CFTC in reparations proceedings).

2. In addition to its effect on the CFTC's reparations program, invalidation of the Commission's counterclaim rule might cast doubt on administrative adjudicatory schemes in other contexts and on the extent of Congress's authority, under the Constitution, to establish new nonjudicial means of resolving disputes. In both Congress and the Executive Branch, considerable study has been given, and is now being

given, to the possible creation of non-Article III forums for the adjudication of the multitude of claims that arise in connection with federal programs and that would otherwise have to be litigated, at great expense and burden, in Article III courts. See, *e.g.*, Committee on Revision of the Federal Judicial System, U.S. Dep't of Justice, *The Needs of the Federal Courts* 7-11 (1977). These efforts would be greatly hampered if this Court were to hold that Article III precludes an administrative tribunal from adjudicating, with the parties' consent and subject to judicial review, counterclaims arising out of the same transaction that gave rise to a claim indisputably within the forum's decisional authority.

C. The Commission's Adjudication Of Conti's Counterclaim Is Consistent With Article III Because Schor Consented To That Adjudication

1. *Schor voluntarily elected to proceed before the CFTC with knowledge that this would permit the Commission to entertain Conti's counterclaim*

Schor plainly gave effective consent to the Commission's adjudication of Conti's counterclaim. As this Court held in *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353 (1982), Schor could have brought suit against Conti in federal district court on his claim that Conti violated the CEA. The Seventh Circuit (the circuit in which Schor and Conti filed their district court claims) had confirmed in 1977 that there is an implied right of action under the CEA. *Hirk* v. *Agri-Research Council, Inc.*, 561 F.2d 96, 103 n.8. When he elected to proceed before the CFTC, Schor unquestionably was aware that the Commission's regulations permitted Conti to bring

his state law counterclaim against him in the same, non-Article III forum. Indeed, Schor actively and repeatedly sought to avoid judicial resolution of his dispute with Conti for the express reason that he preferred to have the entire matter resolved in the CFTC reparations forum. See page 5, *supra*; J.A. 11-14, 17-20.

The court of appeals nevertheless ruled that Schor's voluntary and deliberate decision to proceed before the Commission did not constitute effective consent to the adjudication of Conti's counterclaim because Schor's consent was not "cost-free" (Pet. App. 39a); the court reasoned that the only way that Schor could avoid the adjudication of Conti's counterclaim by a non-Article III forum was to incur the "costs" of foregoing the convenience of having his own claim determined in that forum. This reasoning is manifestly fallacious: it would lead to the conclusion that no party's consent to a non-Article III proceeding is ever effective. Any party who consents to such a proceeding does so because he perceives some advantage in doing so—usually that the non-Article III proceeding will be less expensive and more convenient. But it certainly does not follow that if such a party does not prevail he may attack the adverse result by asserting that his consent was not "cost-free." See, *e.g.*, *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 281 (1942) ("Simply because a result that was insistently invited * * * disappointed the hopes of the [party], ought not to be sufficient for rejecting it."). And in any event, the inevitable presence of disadvantages as well as advantages arising from the choice of one course rather than another has never been thought sufficient to undermine the voluntary nature of consent or of a waiver of rights. See

generally, *e.g.*, *United States* v. *Scott*, 437 U.S. 82, 93 (1978) (criminal defendant's mistrial motion "is deemed to be a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact"); *Boykin* v. *Alabama*, 395 U.S. 238 (1969) (defendant may waive his right to trial by pleading guilty).[17]

Indeed, this Court has consistently made it clear that choices of forum considerably more costly than the election made by Schor are completely effective. In *Thomas*, the Court found it significant that "no *unwilling* defendant [was] subjected to judicial enforcement power as a result of the agency 'adjudication.'" Slip op. 21 (emphasis added). The only persons possibly subject to judicial enforcement, the Court emphasized, were "follow-on" pesticide registrants "who explicitly consent[] to have [their] rights determined by arbitration." *Id.* at 22. That consent, however, is scarcely "cost-free." To the contrary, consent is a mandatory prerequisite to registration under the Federal Insecticide, Fungicide, and Rodenticide Act (see *Thomas*, slip op. 22): if the registrant withholds his "consent," he cannot obtain the required license to market his product. Such a burden is far greater than that faced by Schor, whose consent was required merely to gain the convenience of the administrative forum.

[17] The court of appeals based its requirement of "cost-free" consent on a decision addressing the effectiveness of consent to the referral of actions in federal court to magistrates. See Pet. App. 39a. Nothing in the Magistrates Act, however, would permit a party to consent to bring his claim before a magistrate without agreeing to permit the magistrate to decide factually intertwined counterclaims as well. In any event, the magistrates cases, including *Pacemaker Diagnostic Clinic, Inc.* v. *Instromedix, Inc.*, 725 F.2d 537 (9th Cir. 1984) (en banc), cert. denied, No. 83-1873 (Oct. 1, 1984), on which the court of appeals relied, in no way mandate that consent be "cost-free" in order to be effective. See 725 F.2d at 543 (only "serious burdens and costs" that would make reference to a magistrate a "compelled alternative" would vitiate effectiveness of consent); *Geras* v. *Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1042 (7th Cir. 1984) (consent would not be effective "[i]f a litigant were required to wait ten years for a trial before an Article III judge").

Similarly, in *McElrath* v. *United States*, 102 U.S. 426 (1880), the plaintiff sued the government in the Court of Claims. When judgment was awarded against him on the government's counterclaim, he asserted that he had been denied his Seventh Amendment right to a jury trial. The Court decisively rejected this contention:

> Congress, by the act in question, [has] inform[ed] the claimant that if he avails himself of the privilege of suing the government in the special court organized for that purpose, he may be met with a set-off, counter-claim, or other demand of the government, upon which judgment may go against him, without the intervention of a jury * * *. If the claimant avails himself of the privilege thus granted, he must do so subject to the conditions annexed by the government to the exercise of the privilege. Nothing more need be said on this subject.

102 U.S. at 440. It follows *a fortiori* from *McElrath* that Schor's consent was effective, because Schor, unlike the plaintiff in that case, was not faced with the choice between exposing himself to a counterclaim and abandoning his claim altogether. The Court applied the same principle in *Katchen* v. *Landy*, *supra*, where it held that creditors who filed claims in a bankruptcy proceeding waived their right to a jury

trial on a counterclaim by the trustee: " 'By presenting their claims [respondents] subjected themselves to all the consequences that attach to an appearance.' " 382 U.S. at 335 (citation omitted); see also *Alexander* v. *Hillman*, 296 U.S. 222, 241-242 (1935).

2. *Article III does not prohibit the judicial enforcement of a decision reached in a non-Article III forum with the parties' consent*

a. A fundamental purpose of the provisions of Article III at issue in this case is to "assure impartial adjudication." *Thomas*, slip op. 13; see also, *e.g.*, *Northern Pipeline*, 458 U.S. at 58 (plurality opinion); *Palmore* v. *United States*, 411 U.S. at 412 (Douglas, J., dissenting) ("The safeguards accorded Art. III judges were designed to protect litigants with unpopular or minority causes or litigants who belong to despised or suspect classes."); *O'Donoghue* v. *United States*, 289 U.S. at 534 (citation omitted) (judicial independence is necessary to prevent " 'sacrificing the innocent to popular prejudice; and subjecting the poor to oppression and persecution by the rich' "); *The Federalist No. 78*, at 231 (A. Hamilton) (R. Fairfield 2d ed. 1981); *The Federalist No. 80*, at 238-239 (A. Hamilton) (R. Fairfield 2d ed. 1981); Kaufman, *Chilling Judicial Independence*, 88 Yale L.J. 681, 683-684 (1979). Indeed, Justice Brandeis took the view that any constitutional limitation on Congress's power to assign adjudicative tasks to administrative tribunals arises solely from the Due Process Clause, with its guarantee of an impartial decisionmaker. *Crowell* v. *Benson*, 285 U.S. at 87 (dissenting opinion); cf. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes From History*, 36 U. Chi. L. Rev. 665, 698 (1969) (Article III protections were "not created for the benefit of the judges, but for the benefit of the judged"); see generally, *e.g.*, *Tumey* v. *Ohio*, 273 U.S. 510 (1927).

To the extent, then, that Article III protects a personal right of the litigants, they must be free to elect to forgo that protection as with any other rights, including those relating to the tribunal before which a party is to be tried. Criminal defendants, for example, may waive their right to be tried by a jury. *Duncan* v. *Louisiana*, 391 U.S. 145, 158 (1968); *Patton* v. *United States*, 281 U.S. 276 (1930); cf. Fed. R. Civ. P. 38(d) (waiver of right to jury trial in civil cases). Indeed, they may agree to dispense with a trial altogether. *Boykin* v. *Alabama*, 395 U.S. at 242-243; Fed. R. Crim. P. 11. Similarly, a State may waive its Eleventh Amendment protection from extension of the federal judicial power to a suit against it. *Atascadero State Hospital* v. *Scanlon*, No. 84-351 (June 28, 1985), slip op. 3.

In view of these well-established principles, it is not surprising that this Court has consistently held that the protections embodied in Article III are subject to waiver by the parties. See Silberman, *Masters and Magistrates, Part II: The American Analogue*, 50 N.Y.U. L. Rev. 1297, 1351 (1975) ("The right of civil litigants to consent to trial before a non-Article III judicial officer is long established."). For example, where parties to a suit in federal court voluntarily submit their dispute to a non-Article III special master or referee, the referee's decision may be given the force of a court order following only extremely deferential judicial review. See *MacDonald* v. *Plymouth County Trust Co.*, 286 U.S. 263, 267-268 (1932); *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109, 121-122 (1924); *Ex parte Peterson*, 253

U.S. 300, 314 (1920); *David Lupton's Sons Co.* v. *Automobile Club of America*, 225 U.S. 489, 494-495 (1912); *Kimberly* v. *Arms*, 129 U.S. 512, 524 (1889); *Newcomb* v. *Wood*, 97 U.S. 581, 583 (1878) ("In such an agreement [to refer the case to arbitrators] there is nothing contrary to law or public policy."); *Heckers* v. *Fowler*, 69 U.S. (2 Wall.) 123, 133 (1864); *Alexandria Canal Co.* v. *Swann*, 46 U.S. (5 How.) 83, 86 (1847); *Field* v. *Holland*, 10 U.S. (6 Cranch) 8, 20-21 (1810). See also *United States* v. *Armour & Co.*, 402 U.S. 673 (1971) (enforcing consent decree embodying settlement agreement reached by parties to action pending in federal court); Fed. R. Civ. P. 68 (offer of judgment).

The Federal Arbitration Act, 9 U.S.C. 1 *et seq.*, similarly requires the judicial enforcement of decisions rendered by non-Article III decisionmakers with the consent of the parties. 9 U.S.C. 9. Congress enacted that statute for the same reason that it established the CFTC reparations program: to provide a quick and inexpensive means for the resolution of disputes. See, *e.g.*, *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510-511 (1974); *Wilko* v. *Swan*, 346 U.S. 427, 431-432 (1953); *Revere Copper & Brass, Inc.* v. *Overseas Private Investment Corp.*, 628 F.2d 81, 83 (D.C. Cir.), cert. denied, 446 U.S. 983 (1980); *Diapulse Corp.* v. *Carba, Ltd.*, 626 F.2d 1108, 1110 (2d Cir. 1980). Judicial review of arbitral awards is considerably more deferential than review of the CFTC's reparations decisions. Compare 9 U.S.C. 10 with 7 U.S.C. 9.

Indeed, in *Northern Pipeline*, the only case in which this Court has found an Article III barrier to Congress's establishment of an Article I dispute resolu-

tion tribunal, the absence of the consent of the parties was critical to the result and was recognized in each of the opinions in that case. See 458 U.S. at 80 n.31 (plurality opinion); *id.* at 91 (Rehnquist, J., concurring in the judgment); *id.* at 92 (Burger, C.J., dissenting); *id.* at 95 (White, J., dissenting). Subsequently, in *Thomas* v. *Union Carbide*, *supra*, the Court made it clear that *Northern Pipeline* depended on the absence of the "consent of the litigants." Slip op. 14. And this very Term, in a case under the Magistrates Act, the Court held that it is consistent with Article III for a party to waive her right to judicial review of a magistrate's decision. *Thomas* v. *Arn*, No. 84-5630 (Dec. 4, 1985). As the Court noted, "[a]ny party that desires plenary consideration by the Article III judge of any issue need only ask." Slip op. 13. The same is true here: Schor had full opportunity for judicial resolution of both his claim and Conti's counterclaim, but instead of asking for such a determination, he insistently sought administrative resolution of the dispute. Nothing in Article III requires that Schor's election be disregarded.

Consistently with this understanding of Article III, every court of appeals that has considered the question has upheld the constitutionality of 28 U.S.C. 636(c), which permits the reference of any civil case brought in federal district court, upon consent of the parties, to a non-Article III magistrate;[18] review of

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[18] *K.M.C. Co.* v. *Irving Trust Co.*, 757 F.2d 752, 755 (6th Cir. 1985); *Gairola* v. *Virginia Department of General Services*, 753 F.2d 1281 (4th Cir. 1985); *D.L. Auld Co.* v. *Chroma Graphics Corp.*, 753 F.2d 1029, 1031-1032 (Fed. Cir. 1985); *Fields* v. *Washington Metropolitan Area Transit Authority*, 743 F.2d 890, 893-895 (D.C. Cir. 1984); *Geras* v. *Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1045 (7th Cir. 1984);

the magistrate's determinations is, again, more deferential than review of the CFTC's reparations awards. These courts have relied in large part on the consent of the litigants in holding that magistrates may enter judicially enforceable orders in cases referred to them. See, *e.g.*, *Fields* v. *Washington Metropolitan Area Transit Authority*, 743 F.2d 890, 894 (D.C. Cir. 1984); *Geras* v. *Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1042 (7th Cir. 1984) ("Once the parties have waived their right to Article III protections, they should not be allowed to challenge the constitutionality of the provisions under which they voluntarily chose to proceed."); *Collins* v. *Foreman*, 729 F.2d 108, 119 (2d Cir. 1984), cert. denied, No. 83-1616 (Oct. 1, 1984); *Goldstein* v. *Kelleher*, 728 F.2d 32, 35-36 (1st Cir. 1984), cert. denied, No. 84-5 (Oct. 1, 1984); *Pacemaker Diagnostic Clinic, Inc.* v. *Instromedix, Inc.*, 725 F.2d 537, 543 (9th Cir. 1984) (en banc) (it would be "anomalous" to "forbid[] waiver in a civil case of the personal right to an Article III judge"), cert. denied, No. 83-1873 (Oct. 1, 1984); *Wharton-Thomas* v. *United States*, 721 F.2d 922, 928-

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Lehman Bros. Kuhn Loeb, Inc. v. *Clark Oil & Refining Corp.*, 739 F.2d 1313, 1316 (8th Cir. 1984) (en banc), cert. denied, No. 84-519 (Jan. 14, 1985); *Puryear* v. *Ede's, Ltd.*, 731 F.2d 1153, 1154 (5th Cir. 1984); *Collins* v. *Foreman*, 729 F.2d 108 (2d Cir. 1984), cert. denied, No. 83-1616 (Oct. 1, 1984); *Goldstein* v. *Kelleher*, 728 F.2d 32, 36 (1st Cir. 1984), cert. denied, No. 84-5 (Oct. 1, 1984); *Pacemaker Diagnostic Clinic, Inc.* v. *Instromedix, Inc.*, 725 F.2d 537, 547 (9th Cir. 1984) (en banc), cert. denied, No. 83-1873 (Oct. 1, 1984); *Wharton-Thomas* v. *United States*, 721 F.2d 922, 929-930 (3d Cir. 1983). See also *United States* v. *Ferguson*, No. 85-5502L (4th Cir. Dec. 5, 1985), slip op. 5; *United States* v. *Dobey*, 751 F.2d 1140 (10th Cir. 1985), cert. denied, No. 84-1683 (Oct. 7, 1985).

930 (3d Cir. 1983). Cf. *United States* v. *Raddatz*, 447 U.S. 667, 711 (1980) (Marshall, J., dissenting) (emphasis added) ("[T]here remain some cases in which an *opportunity* for an independent judicial determination of the facts is constitutionally required.").

b. Article III is intended to "protect the role of the independent judiciary within the constitutional scheme of tripartite government" as well as to safeguard the rights of individual litigants. *Thomas*, slip op. 13; see also, *e.g.*, *O'Donoghue* v. *United States*, 289 U.S. at 533. In large measure, of course, these two purposes of Article III are consistent and indeed complementary: an independent judiciary is most valued in order to ensure "a right to have claims decided by judges who are free from potential domination by other branches of government." *United States* v. *Will*, 449 U.S. 200, 217-218 (1980); *O'Donoghue*, 289 U.S. at 531 (independence ensures that the judiciary's "judgment or action might never be swayed in the slightest degree"). Accordingly, it will be the unusual case where the interest of the litigants in a fair hearing before a decisionmaker not subject to influence by the other branches of government will diverge from the public interest in an independent judiciary. And it would be a rare case indeed where that divergence is so marked that the litigants' voluntary election to submit their dispute to a non-Article III tribunal must be deemed constitutionally ineffective. Cf. *Duncan* v. *Louisiana*, 391 U.S. at 156 (right to jury trial in criminal cases is subject to waiver even though that right is related to the protection afforded by "an independent judiciary" and it "reflect[s] a fundamental decision about the exercise of official power * * * [and the Framers']

insistence upon community participation in the determination of guilt or innocence").

This is plainly not that rare case. The CFTC's adjudication, subject to judicial review, of counterclaims that arise out of the same transaction as a reparations complaint between private persons in no way threatens the independence of Article III judges. Nor does it jeopardize the judiciary's ability to function effectively as the ultimate interpreter of the law and, hence, as a constitutionally provided check on the other branches of government. Accordingly, there is no basis in these circumstances for the Court to hold, for the first time, that parties may not agree to submit their dispute to a non-Article III decisionmaker.[19]

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[19] We note that the rule that defects in subject matter jurisdiction are not waivable has no bearing on this case. That doctrine merely permits a federal court to inquire into its own jurisdiction at any stage of a proceeding, notwithstanding the parties' failure to raise the issue in a timely fashion. See, *e.g.*, *Mansfield, C. & L.M. Ry.* v. *Swan*, 111 U.S. 379, 382 (1884); Fed. R. Civ. P. 12(h)(3); see also *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 535-536 (1962) (plurality opinion) (permitting party to raise for first time on appeal question whether federal judge who heard case was protected by Article III tenure and salary provisions). Here, by contrast, the question has nothing to do either with the limited jurisdiction of the federal courts or with the consequences of a procedural default. Rather, the issue is the relevance of the parties' consent to whether the CFTC could adjudicate the case before it. Consent plainly is material to the inquiry in this context, just as it is with respect to adjudication by referees, magistrates, and arbitrators. Indeed, the jurisdiction of the federal courts may be made to depend on consent. See *Williams* v. *Austrian*, 331 U.S. 642, 652-653 (1947); *Schumacher* v. *Beeler*, 293 U.S. 367 (1934). Certainly there is nothing precluding a similar rule with respect to administrative agencies.

This case does not involve any limitation on the salary and tenure protections accorded judges in Article III courts. Compare *United States* v. *Will*, *supra* (salary dispute); *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962) (judges of former Court of Claims and Court of Customs and Patent Appeals protected by Article III); *O'Donoghue* v. *United States*, *supra* (former Supreme Court and Court of Appeals of the District of Columbia constituted under Article III). And unlike cases addressing the authority of magistrates, this case does not involve any question of the delegation of authority within the federal judiciary or any other issue concerning how the judiciary goes about its business. Compare *Thomas* v. *Arn*, *supra* (failure to seek review of magistrate's order before district court may waive right to review in court of appeals); *United States* v. *Raddatz*, *supra* (magistrate may hear evidence and make recommendation on suppression motion).[20]

There is, in sum, no realistic basic for contending that the CFTC's consensual adjudication, subject to

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[20] There is no pertinence here to the objection sometimes voiced to the Magistrates Act on the ground that consensual reference to magistrates may erode the institution of the federal judiciary "'from within, rather than without the judicial department'" (*Northern Pipeline*, 458 U.S. at 79 n.30 (plurality opinion), quoting *United States* v. *Raddatz*, 447 U.S. at 685 (Blackmun, J., concurring)). See generally, *e.g.*, *Goldstein* v. *Kelleher*, 728 F.2d at 36 (upholding Magistrates Act); *Pacemaker Diagnostic Clinic, Inc.* v. *Instromedix, Inc.*, 725 F.2d at 543-544 (same). Whatever concerns over delegation that might prompt a court to conclude that consent is not a complete answer to the Article III issue in the magistrates context simply are not present here. See Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View*, 88 Yale L.J. 1023, 1048-1051 (1979).

judicial review, of state law counterclaims arising out of the same transaction as a reparations complaint threatens in any way to undermine the constitutionally assigned role of the federal judiciary. See generally *Thomas*, slip op. 17 ("practical attention to substance * * * should inform application of Article III"); *Pacemaker Diagnostic Clinic, Inc.* v. *Instromedix, Inc.*, 725 F.2d at 547 ("It is faithful to the idea of separation of powers to examine the real consequences of the statute."). This case obviously does not involve the "transfer [of] jurisdiction from constitutional to legislative courts for the purpose of emasculating the former." *Tidewater Transfer Co.*, 337 U.S. at 644 (Vinson, C.J., dissenting); see also P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 396 (2d ed. 1973) (noting that constitutional concerns would be raised by the "wholesale assignment of federal judicial business to legislative courts, not tied to valid and specific substantive necessities"). The fact that Conti's counterclaim technically arises under state law—a species of claim typically resolved by non-Article III judges—is surely no reason to find the parties' consent any less effective than it would be for federal law claims. Cf. *Northern Pipeline*, 458 U.S. at 98 (White, J., dissenting); see generally Redish, *Legislative Courts, Administrative Agencies, and the* Northern Pipeline *Decision*, 1983 Duke L.J. 197, 210 ("The danger of both potential federal government domination of the federal judiciary and potential governmental displeasure with judicial decisions is at a minimum in suits between private individuals involving state-created common law rights.").

For all of these reasons, Schor's consent conclusively answers any Article III objection to the CFTC's adjudication of Conti's counterclaim and thus fully suffices to dispose of this case. Moreover, as we shall now show, a number of other features of the Commission's reparations forum independently establish the constitutionality of its counterclaim rule.

D. Article III Does Not Preclude The CFTC From Exercising Ancillary Jurisdiction Over Counterclaims That Arise Out Of The Same Transaction As a Reparations Complaint

In *Crowell* v. *Benson*, *supra*, this Court established that it is consistent with Article III for administrative agencies to adjudicate rights between individuals. Last Term, the Court unambiguously reaffirmed the continuing validity of *Crowell* in *Thomas* v. *Union Carbide Agricultural Products Co.*, *supra*. Under *Crowell*, the CFTC plainly has the constitutional authority to adjudicate, subject to judicial review, reparations complaints arising under the Commodity Exchange Act. *Myron* v. *Hauser*, 673 F.2d at 1005; *Rosenthal & Co.* v. *Bagley*, 581 F.2d 1258, 1261 (7th Cir. 1978). *Crowell* and *Thomas*, which eschew "doctrinaire reliance on formal categories," *Thomas*, slip op. 17, in favor of substance and pragmatic considerations, strongly support the constitutionality of the Commission's authority, in this specialized financial area, to entertain counterclaims that arise out of the same transaction that forms the basis for a reparations complaint, wholly apart from Schor's consent to the adjudication.

1. Under its counterclaim rule, the Commission adjudicates only those counterclaims that, like Conti's, arise out of the same transaction as a complaint for reparations. As we have explained, the Commission's ability to entertain such counterclaims is a necessary

element of the entire reparations scheme. This "pragmatic solution to [a] difficult problem," *Thomas*, slip op. 20, is wholly consistent with Article III.

The counterclaims subject to Commission adjudication would be compulsory counterclaims in federal court under Fed. R. Civ. P. 13(a). As such, they would be within the court's ancillary jurisdiction and therefore subject to determination in that forum even in the absence of an independent jurisdictional basis. See *Moore* v. *New York Cotton Exchange*, 270 U.S. 593, 609 (1926); 3 J. Moore, *Moore's Federal Practice* ¶ 13.15[1] (2d ed. 1985). The reason for such a rule is plain: because of the strong incentives for avoiding piecemeal litigation, parties would be deterred from taking advantage of a forum in which they could not resolve the entire controversy between them. See *Moore*, 270 U.S. at 610; 6 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 1414 (1971); Mishkin, *The Federal "Question" in the District Courts*, 53 Colum. L. Rev. 157, 167 (1953); cf. *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966) (pendent jurisdiction); see generally *Alexander* v. *Hillman*, 296 U.S. at 242 (courts of equity, "having jurisdiction of the parties to controversies brought before them, * * * will decide all matters in dispute and decree complete relief"); *Katchen* v. *Landy*, 382 U.S. at 355 (same).

The same considerations, of course, support the Commission's exercise of ancillary jurisdiction over counterclaims such as Conti's. See pages 24-27, *supra*. Indeed, this Court has held that a state law claim may be adjudicated by a non-Article III federal body, subject to judicial review, when it is ancillary to a federal law dispute. *Reconstruction Finance Corp.* v. *Bankers Trust Co.*, 318 U.S. 163, 168-171 (1943)

(Interstate Commerce Commission may decide indenture trustee's claim for expenses in connection with railroad reorganization proceeding); cf. *Tidewater Transfer Co.*, 337 U.S. at 652 n.3 (Frankfurter, J., dissenting) (Congress may exercise its Article I bankruptcy powers to require claim to be brought in federal court even if "a particular claim dissociated from the fact of bankruptcy would have to be brought in a State court for want of any ground of federal jurisdiction"). Once a case is properly in an administrative forum, we perceive no Article III value that could possibly be impinged by allowing the tribunal to entertain those counterclaims that arise out of the same transaction as the main claim and therefore must be decided in order to resolve the dispute.[21]

2. In addition, the CFTC's adjudication of Conti's counterclaim is identical in all material respects to the adjudication upheld in *Crowell* v. *Benson*, *supra*.

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[21] *Northern Pipeline* does not cast any doubt on this conclusion. There, the bankruptcy courts' jurisdiction extended far beyond ancillary, factually intertwined claims to all matters "related to" a bankruptcy proceeding, which included virtually any matter whatever in which the debtor was a party. See 458 U.S. at 54 (plurality opinion). The CFTC's jurisdiction is, in contrast, extremely circumscribed, and it is subject to the same readily identifiable limitations as is the ancillary jurisdiction of the federal courts pursuant to Fed. R. Civ. P. 13(a). Unlike the bankruptcy courts under the 1978 Act, the CFTC does not "entertain a wide variety of cases," a "broad range of questions," or "the entire range of federal and state controversies." 458 U.S. at 54, 74, 75 n.28 (plurality opinion). In short, the CFTC's adjudication of counterclaims, unlike the adjudication at issue in *Northern Pipeline*, is "merely incidental" to the tribunal's determination of a federal cause of action. *Id.* at 80 n.31 (plurality opinion).

In that case, the Court rejected an Article III challenge to the nonconsensual adjudication of claims under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, by the United States Employees' Compensation Commission, a non-Article III administrative body. The factual rulings of the Compensation Commission, like those of the CFTC, were reviewable by an Article III court but could be set aside only if not supported by the evidence (285 U.S. at 46);[22] the legal rulings of the Compensation Commission, like those of the CFTC, were subject to de novo review (*id.* at 45, 49). The CFTC—in its consideration of both claims under the CEA and counterclaims arising from the same transactions—resembles the Compensation Commission in that it has "the obvious purpose of * * * furnish[ing] a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task." *Id.* at 46.

The court of appeals ruled that the CFTC's counterclaim jurisdiction was at least presumptively inconsistent with Article III because it concerns private rather than public rights. Pet. App. 25a-27a. But that was true in *Crowell* as well, where the Court specifically stated that the case did not concern " 'public rights,' " 285 U.S. at 50 (quoting *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18

[22] The Court's conclusion in *Crowell* that the Compensation Commission's findings with respect to "jurisdictional" facts were subject to de novo review (285 U.S. at 54-64) has been seriously eroded by subsequent developments. See, *e.g.*, S. Breyer & R. Stewart, *Administrative Law and Regulatory Policy* 54-55 (1st ed. 1979).

How.) 272, 284 (1855)), but was instead "one of private right, that is, of the liability of one individual to another under the law as defined." 285 U.S. at 51. Moreover, the Court in *Thomas* expressly rejected the wooden notion, relied on by the court of appeals, Pet. App. 25a, that "the right to an Article III forum is absolute unless the federal government is a party of record." *Thomas*, slip op. 16; see also *id.* at 6 (Brennan, J., concurring in the judgment) ("[T]he analysis elaborated by the plurality in *Northern Pipeline* does not place the federal government in an Art. III straightjacket whenever a dispute technically is one between private parties.").

The Court's recent decision in *Thomas* v. *Union Carbide*, *supra*, also directly supports the constitutionality of the Commission's counterclaim rule. The Court admonished in *Thomas* that Article III requires "practical attention to substance." Slip op. 17. Accordingly, the Court analyzed the concerns that prompted Congress to establish an arbitration scheme under FIFRA, and it addressed the actual effect of that scheme on the values underlying Article III. Slip op. 19-23. The Court noted a number of factors that supported its conclusion that the scheme is constitutional, including Congress's intent to achieve the goals of the federal regulatory scheme, the consent of the parties, and the availability and scope of review by an Article III tribunal. The pragmatic concerns underlying Congress's establishment of the CFTC reparations program, which we have discussed above, amply justify the Commission's jurisdiction over counterclaims, just as similar practicalities supported the administrative schemes upheld in *Crowell* and in *Thomas*.

3. The court of appeals appeared to rest its decision in large part on what it viewed as the state-law

source of Conti's counterclaim. In particular, the court on remand dismissed the relevance of the pragmatic inquiry mandated by *Thomas* with the cursory observation that the Court's reasoning applied only to federally created rights. Pet. App. 5a. For a number of reasons, however, that distinction is not controlling—or persuasive—in the present context.[23]

In the first place, as we have explained, the Commission's assertion of jurisdiction over Conti's state law counterclaim does not threaten the role of the federal judiciary as the ultimate expositor of federal law. Moreover, the statute that provided the cause of action adjudicated in *Crowell* "displaced a traditional cause of action and affected a pre-existing relationship based on a common-law contract for hire." *Thomas*, slip op. 17. Here as well, the contracts giv-

[23] There is nothing inherent in state law that prevents federal administrative agencies from adjudicating state law issues in appropriate circumstances. In *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370 (1932), for example, the Court described the scheme under which the Interstate Commerce Commission awarded reparations based on a shipper's common law right to recover where a carrier has charged unreasonable rates. See *id.* at 383-385. See also, *e.g.*, *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) (administrative award of restitution where regulated party departed from rates charged in contract); *Shell Oil Co.*, 29 F.P.C. 498, 500-501 (1963) (agency's decision on rates predicated on interpretation of contract); *Andrews Bros.* v. *Central Produce Co.*, 203 F.2d 949 (6th Cir.) (allowing state law counterclaim in reparations proceeding under 7 U.S.C. 499a), cert. denied, 346 U.S. 855 (1953). We perceive nothing in Article III that would deny administrative agencies the same power to decide state law issues in the context of counterclaims. Indeed, it is commonplace—and wholly consistent with our federal system and the rule of law—for federal questions to be decided in state adjudicatory forums and state questions in federal forums.

ing rise to debit balance counterclaims are subject to Congress's broad grant of regulatory jurisdiction to the Commission.[24] Certainly there is no reason to require the CFTC fully to preempt state law [25] in order to be able to adjudicate these counterclaims consistently with Article III.

In addition, the court of appeals' facile treatment of reparations counterclaims as "garden variety matter[s] of state common law," Pet. App. 5a, is questionable. Although these counterclaims involve contract rights, they are intertwined with and dependent upon claims brought under the CEA, an exclusive federal regulatory scheme that authorizes the Commission to regulate all aspects of the relationship between commodity brokers and their customers. See page 43 note 21, *supra*. Moreover, the counterclaims arise in reparations proceedings, which, like the Commission's own enforcement actions, serve the public interest of ensuring the fitness of CFTC registrants and redressing wrongful conduct by them. And, significantly, while state law is ultimately the source

[24] Congress has vested the Commission with "exclusive jurisdiction" to regulate commodity futures transactions and with expansive rulemaking authority. 7 U.S.C. 2, 12a(5). The Commission thus has the power to regulate the agreements between commodity brokers and their customers that give rise to debit balance claims, and it has exercised that authority in certain respects. For instance, the Commission's regulations prohibit brokers from including in customer agreements any provision guaranteeing the customer against loss. 17 C.F.R. 1.56. Furthermore, the Commission regulates the disclosure and arbitration provisions contained in customer agreements. 17 C.F.R. 1.55, 180.3.

[25] See generally, *e.g.*, *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, No. 83-1925 (June 3, 1985), slip op. 5.

for reparations counterclaims, the Commission does not ordinarily have to resolve any contested issue of state law relating to those claims based, as was Conti's, on customer agreements.[26] Rather, the Commission's ruling on the counterclaim is necessarily dependent on, and usually follows inexorably from, its adjudication of the CEA claim, plainly a matter of federal law. In substance, then, reparations counterclaims are, like the reparations claims themselves, adjudicated under federal, not state, law. See 7 U.S.C. 18.[27] For these reasons, the resolution of reparations counterclaims, in substance, bears many of the features of "public rights" as identified by the Court's "pragmatic understanding" in *Thomas*. Slip op. 19. In these circumstances, we are unable to identify any Article III value that would be jeopardized by the Commission's adjudication of Conti's counterclaim.

4. Finally, the Commission's counterclaim rule is fully consistent with the plurality opinion (as well as the other opinions) in *Northern Pipeline*. The court of appeals treated the plurality opinion as controlling authority on the Article III question even on

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[26] The parties did not contest, and the Commission did not resolve, any question of state law in this case.

[27] Indeed, because decision on the broker's counterclaim is dependent on the Commission's decision on the customer's main claim, the CFTC's resolution of the CEA issues would effectively determine the outcome of any later action brought by the broker in court to recover on the debit balance. See generally *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966) (administrative findings entitled to preclusive effect in subsequent judicial proceedings). There is no basis in Article III for prohibiting the agency from achieving the same result directly by adjudicating the counterclaim in the first instance.

remand following the Court's decision in *Thomas* and even though it acknowledged that CFTC adjudication of state law counterclaims does "not exhibit all of the Article III flaws the *Northern Pipeline* plurality discovered in the 1978 Bankruptcy Act." Pet. App. 33a n.24; see also *id.* at 6a, 7a n.15. In fact, the plurality in *Northern Pipeline* was careful to reconcile its conclusion with *Crowell* v. *Benson*, *supra;* the way in which the plurality did so demonstrates that CFTC adjudication of counterclaims far more closely resembles the functions of the Compensation Commission than it does those of the bankruptcy judges under the 1978 Act, notwithstanding the state law source of debit balance counterclaims.

Unlike the bankruptcy judges in *Northern Pipeline*, the CFTC deals only with a highly "particularized area of law" (*Northern Pipeline*, 458 U.S. at 85); the state law claims that it entertains extend only to those that arise out of the same commodity futures transactions that give rise to federal claims in that particularized area, and they typically require resolution of the same factual and indeed legal issues as the federal claims. See pages 47-48, *supra*. The CFTC "engage[s] in statutorily channeled factfinding functions" and "possess[es] only a limited power to issue compensation orders pursuant to specialized procedures"; unlike the bankruptcy judges, it does not exercise "all ordinary powers of district courts." 458 U.S. at 85. Moreover, CFTC orders are reviewable under a standard comparable to that which applied in *Crowell*, not under the "clearly erroneous" standard applicable to the determinations of bankruptcy judges. See 458 U.S. at 85; 7 U.S.C. 9. "[I]n the[se] circumstances, the review afforded preserves the 'appropriate exercise of the judicial function.'" *Thomas*, slip op. 22 (quoting *Crowell*, 285 U.S. at 54).

In sum, *Thomas* v. *Union Carbide*, *supra*, controls this case. Indeed, the consensual element here is even more pronounced than it was in *Thomas* because the respondent here, unlike the appellee there, had the option to litigate the matter in federal district court but elected to forgo that opportunity in favor of adjudication by the Commission. Moreover, judicial review of the Commission's determination here is not restricted in the manner specified by Congress for review of awards under the arbitration scheme at issue in *Thomas* (see slip op. 4, 22-23). The result here, therefore, follows *a fortiori* from the Court's holding in *Thomas*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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